U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 22 November 2006

CASE NO.: 2006-AIR-13

In the Matter of

RONALD L. BOGARD
Complainant

v.

AIRCRAFT BRAKING SYSTEMS CORPORATION
Respondent

ORDER GRANTING SUMMARY DECISION

On December 12, 2005, Ronald Bogard filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA"), alleging that his employer, Aircraft Braking Systems Corporation, violated the employee protection, or "whistleblower" provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the Twenty-First Century, 49 U.S.C. § 42121 ("AIR 21" or "Act").[1] The regulations implementing the Act are found at 29 C.F.R. § 1979, *et seq.* ("Regulations"). Complainant alleged that Respondent engaged in a pattern of "ongoing harassment" due to a report he had made to the Federal Aviation Administration ("FAA") concerning unapproved parts. This alleged pattern included three specific occurrences: (1) a letter dated April 28, 2005, accusing the Complainant of interfering with the fire department during an emergency situation;[2] (2) a suspension in August 2005; and, (3) a suspension in December 2005. The Respondent contended that it had disciplined the Complainant for poor workmanship and disruptiveness.

On March 15, 2005, following an investigation, OSHA found that the evidence supported the Respondent's assertion and that the Complainant had not been suspended due activity protected by AIR 21.

On April 14, 2006, the Complainant objected to OSHA's findings and requested a hearing before an Administrative Law Judge. I was assigned the case and scheduled a hearing for August 25, 2006. Thereafter, the parties requested a deferment of the hearing to pursue settlement negotiations through the Office of Administrative Law Judges' ("OALJ") settlement

[1] In its Motion for Summary Decision, Respondent averred that Complainant filed his complaint on January 11, 2006. However, documentation of internal OSHA email correspondence that outlines the complaint lists the "submission date" as December 12, 2005.

[2] The Claimant indicated in a statement to OSHA that he had been accused of interfering with the fire department in May 2005. A copy of the aforementioned letter, submitted as part of this Motion as Respondent's Exhibit ("RX") C, however, is dated April 28, 2005. Additionally, it indicates that it was removed from the file on May 16, 2005.

judge procedure. Those negotiations proved fruitless and the case was returned to me on September 22, 2006. The hearing is now scheduled to commence on December 5, 2006 in Akron, Ohio.

On November 2, 2006, the Respondent filed a Motion for Summary Decision. Complainant filed his Reply on November 20, 2006.

The Respondent has made two principal arguments in favor of summary decision: (1) a timeliness argument; and (2) a multi-pronged merits-based argument. Each is addressed in turn.

LEGAL DISCUSSION

A. Summary Decision Criteria

Any party may move, with or without supporting affidavits, for summary decision on all or any part of a proceeding. 29 C.F.R. § 18.40(a). The Administrative Law Judge may enter summary judgment for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 29 C.F.R. § 18.40(d).[3]

In *Turgeau v. Nordam Group*, ARB No. 04-005, ALJ No. 2003-AIR-41 (ARB Nov. 22, 2004), the Administrative Review Board ("ARB" or "Board") articulated the following procedure for adjudicating summary judgment motions under the Act:[4]

> Once the moving party has demonstrated an absence of evidence supporting the nonmoving party's position, the burden shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation….[T]he nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Turgeau*, ARB No. 04-005 at 2-3 (internal citations omitted); *accord Reddy*, ARB No. 04-123 at 4-5.

The Board further emphasized that, in a summary decision ruling, the evidence must be viewed in the light most favorable to the nonmoving party. *Reddy*, ARB No. 04-123 at 5. In doing so, all inferences shall be drawn in favor of the non-moving party. *Id* (citing *Johnsen v. Houston Nana, Inc. JV*, ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10,

[3] In *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005), the Administrative Review Board elaborated on the meaning of "genuine issue of material fact." It stated that "[a] 'material fact' is one whose existence affects the outcome of the case and a 'genuine issue' exists when the nonmoving party produces sufficient evidence of a material fact so that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any probative evidence." *Reddy*, ARB No. 04-123 at 4.

[4] Because the Board reviews issues of law *de novo*, its procedure for reviewing a grant of summary decision is the same as the Administrative Law Judge would follow in ruling on the motion. *See Reddy*, ARB No. 04-123 at 4.

2003).[5] Additionally, the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. *Reddy*, ARB No. 04-123 at 5.

Therefore, the Board has put forth a two-step burden-shifting process, whereby summary decision may be granted only if, given the parameters stated above, the moving party meets its burden AND the nonmoving party fails to meet its own. Conversely, if EITHER the moving party fails to meet its burden OR the nonmoving party succeeds in meeting its burden, summary decision must be denied.

B. Summary Decision Based on Timing

The Respondent has moved for summary decision with respect to complaints based on the April 28, 2005 letter and the August 31, 2005 suspension because of the timing of these complaints. It contended that the Complainant filed his complaint after the time allotted for filing had expired. Therefore, claims based upon these two incidents are untimely and should be dismissed. The Complainant has responded that his claims are timely because he filed a complaint within 90 days of "the latest in a series of discriminatory, retaliatory acts perpetrated by the Respondent." The Complainant further characterized his complaint as involving a "pattern of retaliatory action" and stated that the entire pattern should be "considered in its entirety, once a timely action has been commenced."

The Regulations require a complainant to file the complaint within 90 days after the alleged violation of the Act occurs (i.e., when the allegedly discriminatory decision has both been made and communicated to the complainant). 29 C.F.R. § 1979.103(d).[6] The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *See Sasse v. Office of the U.S. Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, at 6 (ARB Jan. 30, 2004). Absent the application of equitable principles such as waiver, estoppel, or tolling, a complaint shall be dismissed if filed after the expiration of this deadline. *See generally Turgeau*, ARB No. 04-005 at 3-5. If a complainant alleges a hostile work environment, however, the entire claim is actionable even if some contributing acts occurred outside the statutory filing period, so long as at least one contributing act occurred within that timeframe. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). This qualification, however, does not allow for untimely complaints based on discrete acts to be actionable, even if related acts that underlie timely ones. *Id.* at 111; *see also Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006) at 8-9 (holding that *Morgan*, which occurred in the Title VII context, also applies to AIR 21). In determining whether a complainant has alleged a complaint based on discreet acts or a hostile work environment, courts may consider the type of acts involved, whether these acts were based on specific employment decisions, and whether they occurred on specific dates. *Morgan*, 536 US at 114; *Sharpe v. Cureton*, 319 F.3d 259, 268 (6th Cir. 2003).

---

[5] *See also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)(stating that, "On summary judgment the inferences to be drawn from the facts contained in [the materials on the record] must be viewed in the light most favorable to the party opposing the motion.").

[6] *See also Friday v. Northwest Airlines, Inc.*, ARB No. 03-132, ALJ No. 2003-AIR-19 & 2003-AIR-20 (ARB July 28, 2005) at 5) (stating that the complainant must file his complaint within 90 days of the adverse action).

In *Morgan*, the Supreme Court issued a watershed decision concerning the timeliness of complaints based in part on acts that occurred outside the statutorily prescribed period for filing. In that case, the plaintiff claimed that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment. *Morgan*, 536 U.S. at 104. Several of the events upon which the suit was based fell outside the time period for filing. *Id*. at 105. Employing the "continuing violation doctrine," the Ninth Circuit found the untimely events to be sufficiently related to the timely events, such that all were actionable. *Id.* at 108.[7] In resolving a multi-directional circuit split, the Supreme Court held that an "unlawful employment practice" may be either a discrete act or a hostile work environment. *See id.* at 110-116. If a claim is based upon a series of discreet acts, each individual discreet act constitutes its own unlawful employment practice and, therefore, each must itself have occurred within the filing timeframe. *Id.* at 112-113. Therefore, the Supreme Court rejected the continuing violation doctrine and held that discreet acts falling outside the filing timeframe, even if related to those that occurred within it, are not actionable.[8]

Conversely, a hostile work environment is itself considered an "unlawful employment practice," which is based on the cumulative effect of individual acts. *Id.* at 117. Accordingly, all acts, even those that occurred outside the filing timeframe, are actionable under a hostile work environment theory, so long as one act, and thus the entire "practice" in question, occurred within that timeframe. *Id.*

The relevant inquiry, therefore, is whether a complainant has alleged a claim based on a series of discrete acts or a hostile work environment.[9] In *Morgan*, the Court eschewed a bright line definition of "discrete act," opining instead that such acts are easy to identify. *Id.* at 114. However, it did offer as examples of discrete acts failure to promote, denial of transfer, and refusal to hire. *Id.* Moreover, in explaining the legal effect of a discrete act, the Court referred to it as an "adverse employment *decision*." *Id.* (Emphasis added). Additionally, in finding certain acts to be discrete by applying *Morgan*, the Sixth Circuit gave great credence to the fact that the plaintiff was made aware of those acts on specific dates. *Sharpe*, 319 U.S. at 268. Conversely, a hostile work environment involves repeated conduct that cannot be said to occur on a single day. *Morgan*, 536 U.S. at 115. To that end, a hostile work environment exists when a workplace is permeated with discriminatory intimidation, ridicule and insult. *Id*. at 116 (citing *Harris v.*

---

[7] According to the Ninth Circuit's "continuing violation doctrine," a plaintiff's entire claim is actionable if he shows a series of related acts, at least one of which occurred within the limitations period. *Id.* at 107. In arguing in favor of the application of this doctrine, the plaintiff contended that all relevant acts constituted a single employment "practice" such that the occurrence of one such act within the required timeframe renders the entire "practice" timely. *Id.* at 110.

[8] The Court did note, however that acts that occurred outside the timeframe may constitute background evidence in support of claims that are timely filed. *Id*. at 113.

[9] In his Reply, the Complainant referred to a "series" and "pattern" of allegedly discriminatory actions. This argument may be interpreted in two ways: (1) That the Respondent engaged in multiple related discreet acts; or, (2) That the Respondent subjected the Complainant to a hostile work environment. The first interpretation amounts to a proffering of the "continuous violation doctrine," under which untimely complaints are actionable because of their relatedness to timely ones. However, because the Supreme Court rejected that theory in *Morgan*, it is unnecessary to consider it here. Therefore, the sole inquiry under this section is whether the Complainant has alleged a complaint based on discreet acts or a hostile work environment.

Forklift Systems, Inc., 510 U.S. 17, 21 (1993).[10] In determining whether a hostile work environment exists, the Courts should consider all the circumstances of the given case, including the frequency of the allegedly discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interfered with the employee's work performance. *Harris*, 510 U.S. at 23.

In this case, the Complainant's claim is based upon discrete acts, rather than a hostile work environment. Although the Complainant told OSHA that his claim is based on "ongoing harassment," and has referred to a "series" and "pattern" in his Reply, the only examples of alleged discrimination he has cited are the April 28, 2005 letter, the suspension issued on August 31, 2005, and the suspension issued on December 8, 2005. These acts are similar to the examples of discrete acts offered in *Morgan* as they involved specific and separate adverse employment decisions. Moreover, consistent with *Sharpe*, the Complainant was made aware of each on specific dates.

Correlatively, the Complainant has not presented sufficient facts to sustain a claim of a hostile work environment. As noted, a hostile work environment is predicated upon a workplace condition whose cumulative effect is derived from individual acts. Here, the Complainant has set forth neither a sufficient frequency of conduct nor any evidence of such a cumulative effect to sustain such a charge. In referencing only three examples of allegedly discriminatory conduct, he has not set forth sufficient pervasiveness. Moreover, the Complainant has made no showing that the consequences of these incidents transcended normal workplace discipline such that any cumulative effect exists. Thus, he has offered no evidence of an all-encompassing condition that may be considered hostile. *Cf. Harris*, 510 U.S. at 17 (describing how numerous insults and sexual innuendos could combine to create hostile work environment under a theory of sexual harassment.).

Therefore, this issue must be analyzed under the Supreme Court's "discrete act" analysis in *Morgan*. As noted, the Complainant filed his complaint on December 12, 2005. Based on the Regulations' 90 day period for filing, claims based upon acts that occurred before September 13, 2005 would be untimely. Because the April 28, 2005 letter and the August 31, 2005 suspension both occurred before this date, they are untimely. Accordingly, they are no longer actionable under AIR 21.

Therefore, Respondent's motion to dismiss claims based on these two events is granted. Because this portion of Respondent's motion does not address the Complainant's December 8, 2005 suspension, the decision contained in this section does not affect his claim based on that act. Moreover, the April letter and August suspension may constitute background evidence concerning his claim involving the December suspension.

[10] Although *Harris* arose in the context of sexual harassment, this standard for finding a hostile work environment has been employed across the landscape of Title VII. *See Morgan*, 536 U.S. at 116 n.10 (citing *Faragher v. Boca Raton*, 524 U.S. 775, 786-87 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986)).

C. Merits-Based Issues

The Respondent has also moved for summary decision on a variety of merits-based contentions.

1. The Act and its Elements

The whistleblower provision of AIR 21 states:

> No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-
>
> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
>
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United Stated;
>
> (3) testified or is about to testify in such a proceeding; or
>
> (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a).

To prevail in an AIR 21 claim, a complainant must prove four elements by a preponderance of the evidence:

(1) That he is an employee covered under the Act;
(2) That he engaged in activity the Act protects;
(3) That the respondent subjected him to an unfavorable personnel action; and,
(4) That his protected activity contributed to the adverse action.[11]

Gray v. Chautauqua Airlines, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan. 31, 2006) at 4.

[11] This final element assumes that the respondent knew about the complainant's protected activity.

At the outset, some clarification is required concerning the standard Respondent has referenced in support of its merits-based argument for summary decision. The Respondent has stated that, initially, the Complainant must allege facts and evidence sufficient to make a *prima facie* showing, and referenced 49 U.S.C. § 42121(b)(2)(B) and 29 C.F.R. § 1979.104(b). In *Brune*, the Board forcefully explained that the *prima facie* case standard under 29 C.F.R. § 1979.104(b) only applies during the preliminary investigatory stage of the proceeding. *Brune*, ARB No. 04-037 at 12.[12] At the hearing stage- when the case is before an Administrative Law Judge or ARB- the standard set forth at 29 C.F.R. § 1979.109 applies. *Id*. at 13. Pursuant to that standard, a complainant must "demonstrate[e] that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."

As the Board explained, in *Brune*, the relevant distinction is the burden of proof imposed on a complainant. A *prima facie* case is defined as "[t]he establishment of a legally required rebuttable presumption" or "a party's production of enough evidence to allow the trier of fact to infer the fact at issue and rule in the party's favor." *Brune*, ARB No. 04-037 at 12-13 (citing *Black's Law Dictionary* at 1209 (7th ed. 1999). The burden imposed at the hearing stage, however, requires that a complainant "demonstrate" the requisite elements of entitlement. "Demonstrate," the Board explained, "means to prove by a preponderance of the evidence." *Brune*, ARB No. 04-037 at 13 n.33 (citing *Dysert v. United States Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Therefore, a complainant's ultimate burden at the hearing stage is higher as merely raising an *inference* is insufficient; rather, a complainant must *prove* unlawful discrimination. *Brune*, ARB No. 04-037 at 14 (emphasis added).

A complainant may satisfy this burden through either direct or circumstantial evidence. Under the latter approach, it is appropriate to employ the familiar Title VII analysis.[13] Under this framework, if the complainant initially makes an inferential case of discrimination by circumstantial evidence, the respondent may then proffer legitimate non-discriminatory reasons for taking the adverse action, after which the complainant may attempt to prove these reasons constitute a pretext for discrimination. *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31(Sept. 30, 2003) at 6 n.13 (*citing Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).[14] At this point, the Court must examine the legitimacy of the employer's articulated reasons for the adverse action and conclude whether the complainant has proven by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune*, ARB No. 04-037 at 14; *Peck v. Safe*

[12] 49 U.S.C. § 42121(b)(2)(B) similarly refers to the investigatory stage of the proceeding.

[13] The Board made clear that the Title VII analysis is an "evidentiary framework" and not a "burden of proof." Therefore, whether or not it is employed, the burden of proof, whereby the complainant must demonstrate by a preponderance of the evidence that protected activity contributed to adverse action, remains constant. *See Kester*, ARB No. 02-007 at 7 n.17.

[14] The complainant's initial inferential showing of discrimination is sometimes referred to as a "*prima facie* case." *See Parshley Am. W. Airlines*, 2002-AIR-10 (ALJ Aug. 5, 2002) at 52. This should not, however, be confused with the complainant's required *prima facie* showing at the OSHA investigatory level, covered under § 1979.104(b). In noticing this potential source of confusion, the Board commented that it "discourage[s] the unnecessary use of discussion of whether or not a whistleblower has established a *prima facie* case when a case has been fully tried." *Kester*, ARB 02-007 at 6 n.12. Accordingly, when discussing the complainant's initial showing under the Title VII analytical framework, the Board has not used the term "*prima facie* case" but rather "[initial] inferential case of discrimination by circumstantial evidence." *See Peck*, ARB No. 02-028 at 10; *Brune*, ARB No. 04-037 at 14. Likewise, I do so here.

Air Int'l, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). However, even if this analytical framework is employed, the complainant maintains the ultimate burden of demonstrating by a preponderance of the evidence that he engaged in protected activity and that his protected activity was a contributing factor in the adverse action taken against him. *Kester*, ARB No. 02-007 at 7-8.

Therefore, where the parties have referred to the complainant's initial showing under the Title VII analysis as "*prima facie*," it is here considered as the complainant's "initial inferential showing of discrimination." Where parties have referred to any complainant's burden as "*prima facie* case," it is here analyzed under the standard explained in *Brune*.

2. Whether the April 28, 2005 Letter Constitutes an Adverse Employment Action

The Respondent has argued that the April 28, 2005 letter does not constitute an adverse employment action. In support of this argument, Respondent contended that because this letter did not involve a tangible job consequence, it cannot, as a matter of law, constitute an adverse employment action. The Respondent has also pointed out that the letter has been removed from the Complainant's personnel file. The Complainant did not specifically address this argument in his Reply.

As noted above, the Complainant's claim based on the April letter is dismissed because he did not file a complaint based on it within the statutory allotted amount of time. However, even had this complaint been timely, summary decision would be appropriate as to this complaint for lack of an adverse employment action. To establish an adverse employment action under AIR 21, the complainant must show that the action in question had some tangible job consequence. *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Dec. 10, 2003) at 15, *aff'd* ARB No. 04-035 (ARB Sept. 28, 2004).[15] Possible tangible job consequences include termination, demotion, and decrease in salary, benefits, responsibilities or title. *Powers*, 2003-AIR-12 at 15-16 (citing *Shelton*, 1995-CAA-19; *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605 (7th Cir. 2001). Absent a showing of tangible consequences, mere criticisms or negative performance evaluations cannot be considered adverse action. *Powers*, 2003-AIR-12 at 16 (*citing Ilgenfritz v. U.S. Coast Guard Academy*, 199-WPC-3 (ARB Aug. 28, 2001).[16]

[15] Although the ARB's decision did not address this precise point of law, it did specifically affirm the Administrative Law Judge's finding concerning the element of retaliation. *See Powers*, ARB No. 04-035 at 4. That finding was premised largely on the Administrative Law Judge's application of the requirement of a tangible job consequence. *See Powers*, 2003-AIR-12 at 15-16. Moreover, the ARB has applied this same requirement in the context of other whistleblower laws. *See e.g. Shelton v. Oak Ridge Nat'l Laboratories*, 1995-CAA-19 (ARB Mar. 30, 2001).

[16] In *Daniel v. TIMCO Aviation Services, Inc.*, 2002-AIR-26 (June 11, 2003), the Administrative Law Judge provided an erudite analysis, explaining why a strict tangible consequences requirement, whose genesis exists in Title VII litigation, should not apply in the whistleblower context. The Administrative Law Judge reasoned that such a requirement is necessary in Title VII, which seeks only to protect economic opportunity, while whistleblower statutes exist, in part, to encourage certain employee behavior. *Daniel*, 2002-AIR-26 at 14. Therefore, the Administrative Law Judge continued, protection should be given based on the retaliatory development of a critical personnel record, which may be designed to thwart whistleblowing. *Id.* at 15. The Administrative Law Judge, however, specifically excepted from his analysis temporary reprimands, which do not "permanently [scar] a worker's personnel record." *Id.* at 16. Therefore, although not binding, to the degree that *Daniel* offers persuasive

In this case, the April 2005 letter concerning the Complainant's conduct during a fire emergency lacks sufficient tangible job consequences to constitute an adverse employment action. The letter, which reported that the Complainant was out of his work area without authorization and interfered with emergency personnel, amounted to mere criticism at the time it was written. The Complainant has incurred no detriment comparable to those identified in *Powers* as a result. Moreover, the fact that the letter was removed from the Complainant's personnel file strongly buttresses this conclusion. Therefore, the April 2005 letter did not constitute an adverse employment action against the Complainant. Because he cannot establish this requisite element of entitlement as to this complaint, summary judgment is appropriate, even if the complaint had been timely.

3. Whether there exists a genuine issue of material fact as to whether protected activity contributed to the disciplinary actions taken against the Complainant

The Respondent has argued that there is no evidence to support an inference that the Complainant's protected activity contributed to any discipline he incurred. The Respondent's presentation of this argument merits substantial clarification.

First, the Respondent has contended that there is no "direct evidence to support an inference that [the Complainant's] report to the FAA contributed in any way to the discipline he received." This argument, however, does not account for possible reliance on circumstantial evidence. Moreover, it also appears to improperly conflate the § 1979.104(b) investigatory standard with the complainant's use of direct evidence to meet his burden under § 1979.109. As discussed above, the investigatory standard is incorrect for adjudication at this level. Additionally, the use of direct evidence to meet the § 1979.109 burden does not involve making an initial inferential showing. Therefore, summary decision is only appropriate as to this issue if there is no genuine issue that protected activity contributed to any adverse action, based under both the direct evidence and circumstantial evidentiary frameworks.

Second, in a separate section, the Respondent argued that "even if this tribunal determines that [the Complainant] has made the required *prima facie* showing, the discipline [he] received was warranted…." The Respondent then offered a rationale for each allegedly discriminatory action. In support of this argument, it cited 29 C.F.R. § 1979.104(c), which applies at the investigatory level, and states that "[n]otwithstanding a finding that a complainant has made a *prima facie* showing, as required by this section, an investigation of the complaint will not be conducted if the named person… demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected conduct or behavior." This position is problematic on several levels. First, as stated above, 29 C.F.R. § 1979 is not applicable at this stage of the proceedings; it only applies at the investigation stage. Second, to the degree that this argument applies the correct subsection- 29 C.F.R. § 1979.109- Respondent has again conflated two legal concepts, namely the Title VII framework for establishing discrimination by circumstantial evidence and the affirmative defense provided in § 1979.109. With respect to the former, if a complainant seeks to establish

---

guidance, it does not countervail a grant of summary decision in this case as the letter in question here was removed from the Complainant's personnel file, and, thus, amounted to a temporary measure.

discrimination by circumstantial evidence using the Title VII framework, the respondent need only produce legitimate nondiscriminatory reasons for taking the action after the complainant makes an initial inferential case. Contrary to Respondent's argument, a respondent need not show "by clear and convincing evidence" that it would have acted as it did at this stage. Rather, it only incurs a burden of production at this point.[17] Conversely, § 1979.109 also provides an affirmative defense, whereby a respondent does incur a burden of justifying its decision by clear and convincing evidence if the claimant first demonstrates discrimination. However, this burden is only activated after the complainant establishes discrimination, either by direct or circumstantial evidence.

In this case, the only evidence presented to establish discrimination is circumstantial. "Direct evidence" is based on personal knowledge and observation and, if true, proves a fact without inference; conversely, "circumstantial evidence" is based on inference, rather than personal knowledge or observation. *Black's Law Dictionary* 576-77 (7th ed. 1999).[18] Here, the crux of the Complainant's case relates to the timing of the allegedly discriminatory acts. Specifically, the Complainant has pointed to his lengthy history of employment with the Respondent, in which he incurred no discipline until after reporting his safety concerns. This type of evidence would require a consideration of attendant facts and circumstances to support a finding that protected activity contributed to the adverse action; therefore, this case must be analyzed for the establishment of discrimination under the Title VII framework

Thus, Respondent's reference to its rationale for taking disciplinary steps against the Complainant serves two purposes: (1) For the purpose of this section, it is offered to meet the employer's burden of production in the Title VII analysis; and (2) It serves as the basis for an argument based on the § 1979.109 affirmative defense, to be considered in the following subsection.

As a result, after parsing Respondent's multiple conflations, in clarifying its position in this section, Respondent has made a two pronged argument for summary decision: (1) That the Complainant has not made an initial inferential showing of discrimination; and (2) Assuming that he has, Respondent has met its burden of production of setting forth legitimate reasons for taking disciplinary action against the Complainant.[19]

In considering a motion for summary decision concerning a showing of discrimination based on circumstantial evidence, the Court may consider the strength of the complainant's initial inferential showing, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on such a motion. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148-49 (2000).[20] In *Reeves*, the Supreme Court rejected the Fifth Circuit's ruling that a

[17] As noted above, if the respondent meets this minimal burden, the complainant must then show that the respondent's proffered reasons are pretextual. If he does so, discrimination is established.

[18] "Inference" is defined as "a conclusion reached by considering other facts and deducing a logical consequence from them." *Black's Law Dictionary* 781 (7th ed. 1999).

[19] Of course, for Respondent to achieve summary decision on the second point, the Complainant must fail to establish that the Respondent's asserted reasons are pretextual.

[20] *Reeves* arose under the Age Discrimination in Employment Act ("ADEA"). The ARB has approved its use generally in whistleblower cases before this Court. *See Overall v. Tenn. Valley Auth.*, ARB Nos. 98-111 & 98-128,

plaintiff's initial inferential showing, combined with sufficient evidence to disbelieve the defendant's legitimate non-discriminatory reason for its decision, but absent additional evidence of discrimination, is insufficient as a matter of law to sustain a finding for the plaintiff. *Reeves*, 530 U.S. at 146-47.[21] Rather, the Court concluded that the plaintiff's initial inferential showing, combined with sufficient evidence to find that the employer's asserted justification is false, may permit a trier of fact to conclude that the employer unlawfully discriminated. *Id.* at 148. In such a case, summary decision would be inappropriate. However, the Court noted that such a showing will not necessarily preclude finding for the employer as a matter of law. *Id.* Such a finding may be appropriate, for instance, where the record reveals an additional non-discriminatory reason for the employer's decision or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred. *Id.* Hence, the Court put forth the multi-factorial consideration, described above, to be applied as dictated by the circumstances of the particular case.

a. Whether the Complainant has made an inferential case of discrimination

The Respondent has contended that the Complainant has not made an inferential case of discrimination. Specifically, Respondent has argued that the Complainant's complaint is based merely on his own opinion that his discipline was related to his report to the FAA, but is devoid of any supporting facts. The Respondent has further asserted that, because the Complainant's only actionable complaint is based on his December suspension, temporal proximity between his report to the FAA and that suspension provides no inference of discrimination. In his Reply, the Complainant asserted that he has made an inferential case of discrimination, based largely on the totality of his employment history. According to the Complainant, he had a lengthy history of successful employment with the Respondent prior to his report to the FAA, and incurred discipline only after his reporting.

A complainant makes an initial inferential case by showing: (1) that the respondent is subject to the Act; (2) that he engaged in protected activity; (3) that he suffered an adverse employment action; and, (4) that a nexus existed between the protected activity and the adverse action. *Overall*, ARB Nos. 98-111 & 98-128 at 13.[22] This standard is inherently flexible and designed to be applied as dictated by the facts and circumstances of the specific case. *Burdine*, 450 U.S. at 254 n.6. Proximity in time, generally, may be sufficient to raise an inference of causation. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). However, it should be considered within the context of the particular factors of the case. *See generally Overall*, ARB nos. 98-111 & 98-128.

ALJ No. 97-ERA-53 (ARB Apr. 30, 2001) at 10. Moreover, *Reeves* is predicated upon a thorough consideration of Title VII precedent, upon which whistleblower case law is largely based.

[21] *Reeves* arose in the context of a motion for judgment as a matter of law. The Court, however, specifically analogized between resolving such a motion and a motion for summary judgment. *See Reeves*, 530 U.S. at 150. Indeed, it specifically stated that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law." *Id* (citing *Anderson v. Libby*, 477 U.S. 242, 250-51 (1986)). Therefore, the Court's conclusions in *Reeves* apply to the context of summary decision.

[22] "Nexus" is defined as "[a] connection or link, often a causal one." *Black's Law Dictionary*, 1066 (7th ed. 1999). The nexus requirement has also been described as an "inference of causation" between the protected activity and the adverse employment action. *See Bechtel v. Sec'y of Labor*, 50 F.3d 926, 934 (11th Cir. 1995).

In this case, the Complainant has made an initial inferential case. It is undisputed that the Respondent is subject to the Act and that the Complainant engaged in protected activity by filing a report with the FAA. It is also undisputed that the Complainant incurred at least a modicum of adverse employment action.[23] Finally, the Complainant has set forth sufficient facts to establish a nexus between his report and the adverse action taken against him. In pointing to his twenty years of problem-free employment, followed by the imposition of discipline within a year after filing, the Complainant has demonstrated sufficient temporal proximity between his report to the FAA and the discipline he incurred, within the context of this case. Because, however, the Complainant has not buttressed this position with attendant circumstantial evidence, his inferential showing is notably weak.[24]

As discussed above, the Complainant's complaints based upon the April letter and August suspension are dismissed as untimely. However, this finding of initial inferential showing is unaffected by this ruling on timeliness. To that end, assuming that the complaints based on these two incidents are timely, the causal link between the discipline and report to the FAA exists, as the incidents of discipline occurred only after the Complainant made his report to the FAA. However, even considering dismissal of complaints based on the first two incidents, evidence of those incidents may be considered in assessing the complaint based on the December suspension. In doing so, the inferential showing remains, because, although not actionable, they serve as evidence of workplace difficulties that arose only after the filing of the FAA report. Thus, they support the link between the protected activity and the December suspension.

Accordingly, because the Complainant has set forth an initial inference of discrimination based on circumstantial evidence, the Respondent is not entitled to summary decision on this point.

b. Whether the Respondent has set forth legitimate reasons for taking adverse action

Once the complainant sets forth his initial inferential showing, a presumption of discrimination exists. *Burdine*, 450 U.S. at 254 n.7. The burden then shifts to the respondent to articulate a legitimate nondiscriminatory reason for the adverse action. *McDonnell Douglas*, 411 U.S. at 802. The respondent's burden at this point is a burden of production, whereby it must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse action. *Burdine*, 450 U.S. at 255. However, the respondent need not prove that it was actually motivated by these proffered reasons. *Id.* at 254. Indeed, because the respondent's burden at this stage is one of production, and not persuasion, consideration of its stated reasons involves no credibility assessment. *Reeves*, 530 U.S. at 143 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)). If the respondent meets this burden, it rebuts the presumption created by the complainant's initial showing. *Burdine*, 450 U.S. at 254.

[23] As discussed above, the whether the April letter constitutes and adverse employment action and the actionablility of the April letter and August suspension are in dispute. However, that the December suspension is both actionable and constitutes an adverse action is not in dispute.

[24] *See Reeves*, 530 U.S. at 148 (indicating that a plaintiff's initial inferential showing may be accorded varying degrees of strength).

As discussed above, the Respondent has offered nondiscriminatory rationales for each measure of discipline at issue. It stated that the Complainant was suspended in December 2005 for inappropriate and disruptive behavior, specifically for the excessive use of profanity and purposely releasing bodily gasses on coworkers. Respondent attributed the August 2005 suspension to the Complainant's poor workmanship, specifically, because he was taking apart flexure sleeves without permission. Finally, to the degree that the April letter constituted an adverse employment action, Respondent again asserts that because it was removed from the Complainant's file, consideration of its motive for issuing it in the first place is moot.

Respondent has met its burden with respect to all three incidents of discipline.[25] The Respondent has clearly set forth legitimate reasons for both the December and August suspensions. Moreover, it has introduced admissible evidence to support these assertions. To that end, Respondent has provided a copy of the letter documenting his December suspension for disruptiveness (RX E) and a copy of the letter documenting his August suspension for poor workmanship. (RX D). The Respondent has also pointed to the Complainant's deposition testimony where he admitted to the acts underlying each suspension.[26] While it exceeds Respondent's burden to consider whether this evidence establishes that it was actually motivated by these proffered reasons, this evidence does further the legitimacy of these reasons.

Although the Respondent has not argued a specific legitimate nondiscriminatory reason for writing the April 2005 letter, one exists. Namely, as evidenced by the letter itself, the Respondent wrote the letter to document its concerns that the Complainant interfered with emergency personnel during an incident. Because this concern is expressed in the text of the letter, admissible evidence exists to support it. Therefore, albeit unwittingly, the Respondent has asserted a legitimate nondiscriminatory reason for issuing the April letter, to the degree that one is necessary.

Therefore, with respect to all three incidents of discipline at issue, the Respondent has met its burden of articulating legitimate nondiscriminatory reasons.

c. Pretext

Once the respondent meets its burden of producing legitimate nondiscriminatory reasons for the adverse actions, the complainant is afforded the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but in fact a pretext for discrimination. *Reeves*, 530 U.S. at 143 (citing *Hicks*, 509 U.S. at 511). A complainant meets this burden by setting forth sufficient evidence to show that the respondent's proffered explanation is unworthy of credence. *Reeves*, 530 U.S. at 143 (citing *Burdine*, 450 U.S. at 256).

[25] Although the complaints based on the April letter and August suspension are dismissed as untimely, and the April letter is also dismissed for lack of adverse employment action, all are considered, alternatively, in this subsection.
[26] *See* Complainant's deposition at 28 &32 (admission of excessive profanity); Complainant's deposition at 24 (admission of purposely releasing bodily gasses on coworkers); and, Complainant's deposition at 74 (admission of taking apart flexure sleeves).

In his Reply, the Complainant has argued, generally, that the discipline he incurred was "not merited or excessive." The Complainant, however, has offered no evidence to show the falsity of the Respondent's asserted reasons. Therefore, he has not shown the reasons proffered by the Respondent to be a pretext.

d. Conclusions

In applying the Title VII framework to this case, no genuine issue of material fact exists as to whether protected activity contributed to any adverse employment action taken against the Complainant. To that end, while the Complainant established an initial inferential showing of discrimination, the Respondent met its burden of articulating legitimate nondiscriminatory reasons for taking the disciplinary measures. Therefore, it successfully rebutted the presumption that arose out of that initial showing. The Complainant then failed to present any evidence to undercut the Respondent's proffered reasons. Accordingly, in the larger sense, no issue remains as to whether the Respondent discriminated against the Complainant based on his protected activity. Therefore, the Respondent is entitled to summary decision.

4. § 1979.109 Affirmative Defense

As noted above, 29 C.F.R. § 1979.109 states that even if a complainant established that protected activity contributed to an adverse employment action, thereby proving discrimination, a respondent may avoid liability if it can demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity." This burden amounts to an affirmative defense and arises only if the complainant first proves discrimination. *Kester*, ARB No. 02-007 at 8.

In this case, the Respondent has argued that, even if the Complainant proved discrimination, it established, by clear and convincing evidence, that it would have taken the same disciplinary steps against the Complainant, regardless of any protected activity. It asserted the same rationales toward this argument that it did as legitimate nondiscriminatory reasons, *supra*. Again, Complainant, contended in his reply that these measures were without merit and excessive.

Because summary decision is granted, as described above, because there is no genuine issue of material fact that the protected activity contributed to adverse action, it is unnecessary to consider whether the Respondent has met its heightened burned to entitle it to summary decision here. However, had such an inquiry been required, Respondent would not have been entitled to summary decision based on this point. To that end, it is inappropriate to consider this argument at the summary decision stage. In *Reddy*, the Board made clear that the adjudicator should apply the summary decision framework "without weighting the evidence." *Reddy* at 5 (citing *Johnsen* at 4; *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-91, slip op. at 6 (ARB Nov. 30, 1999). Respondent's argument, however, necessarily involves a weighing of evidence. It assumes *arguendo* that Complainant's evidence establishes a violation but contends that its evidence proves controlling. Reaching this conclusion would be an exercise in the weighing of evidence. Therefore, because it is inappropriate to engage in such an exercise at this stage,

Respondent's argument of its clear and convincing evidence cannot support a grant of summary decision.

CONCLUSIONS

In its Motion for Summary Decision, Respondent has established that the Complainant's complaints based on the April 2005 letter and August 2005 letter are untimely and therefore shall be dismissed. Respondent has alternatively established that it is entitled to summary decision concerning the complaint based on the April 2005 letter because that letter did not constitute an adverse employment action. Additionally, the Respondent has established that there is no genuine issue of material fact as to whether protected activity contributed to any adverse action. To that end, although the Complainant established an initial inferential showing based on circumstantial evidence, the Respondent rebutted this showing by articulating legitimate nondiscriminatory reasons for taking the disciplinary steps and the Complainant asserted no evidence that these reasons were pretextual. Therefore, no issue exists as to whether any discrimination occurred. Finally, although no longer necessary, Respondent's argument based on the § 1979.109 affirmative defense would not provide a basis for summary decision because it is inappropriate to consider such an argument at this stage.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Respondent's Motion for Summary Decision is GRANTED. The hearing scheduled to commence on December 5, 2006, in Akron, Ohio, is CANCELLED.

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).